

FILE

December 3, 1998

BY FACSIMILE AND U.S. MAIL

Thomas E. Greenland
Environmental Counsel .
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, NE 68179-0001
Fax No. 402-271-5610

Re: Coeur d'Alene Basin Settlement Negotiations

Dear Tom:

We are writing in response to your letter dated November 4, 1998 in which you set forth Union Pacific's latest offer regarding certain key provisions of a potential settlement between your company and the federal, state and tribal governments. We appreciate the movement that Union Pacific showed in a number of aspects of its latest offer. Nonetheless, there are still several respects in which Union Pacific needs to increase its offer in order for the parties to be able to reach a non-binding "agreement in principle" on the terms of settlement. We will organize our response according to the numbered paragraphs of your November 4th letter.

1. Response Action Obligations: We agree that, under a settlement among the parties, Union Pacific would implement response actions in accordance with the design documents currently being developed by the parties. As attachments to and components of the Consent Decree embodying the settlement, the design documents would be subject to the public review and comment requirement of CERCLA. We have worked to give you sufficient information about the response action that must be implemented to enable you to estimate the cost of the work that must be performed. However, as you know, the response actions will be selected based on their meeting the requirement that they protect human health and the environment, not on their cost to Union Pacific.

2. Disposal Site: We agree with the statements in your letter regarding use of the Central Impoundment Area and slag pile area, to the extent your statements are consistent with the criteria for accepting waste from outside the Bunker Hill Site at the CIA set forth in the December 12, 1997 memorandum from Michael F. Gearheard of EPA (attached). We disagree that use of the slag pile may extend into the 2001 construction season. As we stated at the recent meeting in Seattle, the slag pile area may only be used through the 2000 construction season. We believe that the parties should be able to keep these negotiations and the regulatory pre-requisites to a settlement moving on a schedule that will make the need for a disposal site after 2000 unnecessary. As to releases of liability for hazardous substances disposed of in the CIA and slag

pile, Union Pacific would receive covenants not to sue similar to those included in the Consent Decree settling claims against Union Pacific in the Bunker Hill Superfund Site.

We believe that our efforts to provide Union Pacific with a low-cost and convenient disposal location within the Basin for materials containing hazardous substances has been of significant benefit to you. We also wish to note that we are offering to provide you this disposal facility without charging a tipping fee, and the State is taking on long-term O&M obligations for the slag pile. We have considered these benefits to Union Pacific in determining our settlement position for Trail O&M, and Union Pacific should recognize that if its offer on Trail O&M is deficient, we may have to revisit the no tipping fee and slag pile O&M issues.

3. Response Action/Trail O&M: We will organize our comments regarding this topic according to the subparagraphs in your letter. However, we want to emphasize at the outset that the principle respect in which Union Pacific's offer regarding O&M is deficient relates to perpetual responsibility for operation and maintenance. As representatives of the federal, state and tribal entities all stated at the Seattle meeting, we are looking to Union Pacific to provide for response action O&M in perpetuity. We see it as a critical priority that the response action remains protective of human health and the environment into the future. The need for Union Pacific to be responsible for long term response action O&M is especially crucial here, since the governments are allowing hazardous substances to remain in place along the Union Pacific right of way. Thus, we cannot agree to Union Pacific's proposal to split responsibility for response action O&M after 30 years between the railroad and the tribal/state entity.

Our response to the other elements of Paragraph 3 are as follows:

(a) Response Action O&M: We look to UP to perform and/or fund such O&M in perpetuity.

(i) The periodic routine inspections performed by State/Tribal Trust (STT) personnel shall in no way relieve Union Pacific of obligations related to either the inspection or repair of remedy elements, and the cost of inspections by STT personnel are oversight costs not included in the Trail O&M amounts discussed below. Union Pacific must be responsible for repair of damage to the response action barriers.

The O&M plan will generally describe preventative maintenance activities, end point definitions, and definitions of conditions that will trigger Union Pacific's obligation to repair damage to some aspect of the response action. Appropriate response actions required of Union Pacific to repair damage to the response action barriers will also be defined. The federal, state and tribal entities will also define each entities' responsibilities for oversight of Union Pacific's implementation of the response action and oversight of Union Pacific's performance of O&M, and will work out procedures for enforcement and taking actions to maintain the protectiveness of the response action.

The routine response action O&M activities that will be the responsibility of Union Pacific are as follows:

(1) Inspections of the protective barriers will be conducted according to the following schedule:

- Inspections of the barrier components
 - * Routine inspections — 1 such inspection per month.
 - * Major inspections — 2 per year.
 - * Extraordinary — After storm events of a defined severity or notice by an oversight representative that is given under agreed-to oversight protocols.

(2) Preventative maintenance:

- Ditches and culverts--perform the following steps to meet endpoint definitions that will be included in technical attachment to Consent Decree, but no less than two times per year.
 - * snagging, flushing, clearing to allow through flow.
 - * minor invert grade adjustments to allow gravity drainage through culvert.
 - * perform weed control as it may relate to endpoints for maintaining the integrity of the barriers, but no less than two times per year. Weed control may include spraying, burning, and/or manual removal and subsequent barrier repair.
 - * at parking areas that are part of the protective barrier, perform surface maintenance to meet endpoint definitions.
 - * relocate access barriers as needed to prevent public access to off-trail areas at which no response action has been performed in order to prevent unauthorized access and potential exposure to hazardous substances.
- Necessary repairs:
 - * repairs to asphalt trail, including shoulder grading and erosion, to meet specified endpoints.
 - * repairs of embankment erosion to meet specified endpoints.
 - * repairs of erosion of other protective barriers to meet specified endpoints.
- The technical attachments to Consent Decree will include provisions for five year review of response action, including testing, evaluation of barriers and preparation of an evaluation of the response action by qualified technical

personnel every five years during the initial 30 years after entry of Consent Decree.

(ii) The primary purpose served by the asphalt "trail" surface along the rail line is as a protective barrier over contamination being left in place. Since it is an integral component of the response action, we are looking to Union Pacific to maintain this asphalt surface in perpetuity. Thus, not only must Union Pacific replace the asphalt surface at some point within the first 20 years of trail operation, it must also provide sufficient funds for maintenance and replacement of the asphalt surface as needed in perpetuity. The frequency of routine maintenance and replacement of the asphalt surface must be provided in the O&M plan in accordance with commonly accepted national engineering standards.

(iii) Union Pacific must perform and/or fund repair of catastrophic failures of the response action barriers in perpetuity, as with other aspects of response action O&M. Repair of response action barriers will include repair or reconstruction of berms, embankments and armoring of the railroad grade itself.

(b) Trail O&M: As to the description of trail O&M activities, we agree to the trail O&M activities as outlined in your November 4th letter with the exception of relocation of access barriers. Because of the potential for human exposure to hazardous substances resulting from access to off-trail areas, this activity should be included under the response action O&M activities. We are not in agreement with your current offer of \$2,000,000 and the associated conditions described in your November 4th letter. It is the State and Tribe's firm position that Union Pacific must provide a payment of \$2,500,000 to the STT for use for Trail O&M. Our letter of October 16, 1998 set forth the trail O&M items that we believe must be funded. The increase in the amount we seek for trail O&M over our last offer is necessary because bridge inspection and maintenance has been moved from response action O&M to trail O&M. Union Pacific's payment is to be made within a short period of time after entry of the Consent Decree and cannot be made contingent upon Union Pacific's receipt or use of ISTEA funds. The Idaho Transportation Department has now approved the application for \$1,000,000 in ISTEA funding to be applied to this project. Ensuring that this available funding is actually utilized will require appropriate actions by Union Pacific that are not within the control of the Trustees. The Idaho Department of Parks and Recreation will commit to provide appropriate assistance to Union Pacific to realize the available funding.

The \$500,000 gap between the parties' positions is of substantial concern to the State and the Tribe. The Trustees believe Union Pacific should commit to the requested funding in consideration of the following factors: the willingness of the State and Tribe to assume responsibility for the rail-trail facility which makes possible the containment in place of hazardous substances and other response actions being considered; the savings to Union Pacific related to use of the CIA and slag piles without tipping fees or long term O&M requirements (which are being assumed by the State); and the savings to Union Pacific in construction costs from not only the ISTEA grant but also the trail construction expenditures by the City of Kellogg with funds

which were redirected with State and EPA approval from Union Pacific's remedial obligations within the Bunker Hill Superfund Site. These factors must be viewed against the backdrop that these O&M costs have survived independent scrutiny by both the State and the Tribe and then have been further reduced to what were jointly agreed to be the essential items. These costs are real and necessary and will be fully assumed by the State and Tribe after 10 years.

In addition to the amount requested above, the State and Tribe are also requesting that Union Pacific fund a reasonable amount of start-up costs to purchase equipment necessary to begin trail operation and maintenance. Finally, to the extent future grants or funding sources may be found (none are currently known) to defray Union Pacific's construction costs, the Trustees seek Union Pacific's agreement that any amounts saved will be added to the Trail O&M Fund.

(c) Perpetual responsibility for response action O&M: As we stated above, we look to Union Pacific to perform response action O&M for the first 30 years, and to provide sufficient funding for the tribal/state entity to be able to perform such O&M thereafter in perpetuity. In the alternative, we would be willing to have Union Pacific take on the responsibility for performing response action O&M in perpetuity. Furthermore, we do not accept your proposal that lease/license revenue generated during the first 10 years of trail operation be used for long term response action O&M. As we have previously stated to Union Pacific, the State and the Tribe believe that almost all money generated by lease revenues will be needed to fund the administration of these leases. If there is any profit from leases, this money will be used by the Tribe and State to augment their Trail O&M funding. Therefore, lease revenues should not be considered as available for response action O&M. It is the Trustees' understanding that Union Pacific is taking appropriate actions to resolve existing encroachment issues along the right of way.

Regarding the point in the future at which the long term funding mechanism for response action O&M gets established, we believe that the parties should initially establish the long term fund sooner than 10 years after the onset of trail operation. The long term fund should be established sooner, perhaps 5 years after the commencement of operations, to increase the likelihood that some personnel familiar with the Consent Decree will still be around to work on establishing the fund. Final agreement on the total amount to be paid into the perpetual response action fund should occur at the end of the 30 year period, so that we have the benefit of many flood seasons and experience regarding the O&M costs that are incurred as a result. We would be willing to discuss with you working out a schedule of interim payments by Union Pacific into this perpetual fund between its establishment after 5 years and the date when the tribal/state entity takes over performance of response action O&M.

4. NRD Settlement: In Tom Swegle's letter to you dated October 23, 1998, the government reduced the amount for which it would settle the claim for natural resource damages from \$4,000,000 to \$2,650,000. We viewed that as a highly significant movement on our part to try to reach an equitable settlement with Union Pacific. In your November 4th letter, you offered to settle this claim for \$2 million.

We view the differences between our positions regarding O&M and NRD as the two biggest gaps that we must close if we are to reach settlement with Union Pacific. In order to close the gaps, we are willing to reduce our settlement demand on the NRD claim if Union Pacific will accordingly raise its settlement offer on response action and trail O&M up to the governments' position.

If we reach settlement with Union Pacific, we plan to use a portion of the NRD settlement monies to reimburse the Department of the Interior's natural resource damage assessment fund for assessment costs incurred in the Coeur d'Alene Basin.

5. Trail Amenities: We believe we are in agreement with your offer regarding trail amenities subject to the incorporation of such amenities into appropriate design documents with the participation and approval of the State and the Tribe. It is our view, however, that the exact number of amenities listed in Tables 1 and 2, such as highway signs, bollards, fencing, flashers and the like will be determined by applicable safety and operation requirements as set forth in national trail operations guidelines and standards such as the Manual of Uniform Traffic Control Devices and not necessarily by what is listed in the two tables. We believe such adjustments will be minimal but cannot be finally determined until we complete the design documents. Any necessary upward adjustments of amenities shall not be funded from the \$100,000 offered by Union Pacific for upgrades of existing community facilities or other uses determined by the STT.

6. Past and Future Costs: As Tom Swegle proposed in Seattle, rather than simply capping the federal government's response costs, we will provide you with information on the federal governments' response costs through September 30, 1998, and we will use that cost figure as the past response cost amount in a Consent Decree settling our claims. Because of lags in accounting at various agencies, we do not yet have cost information for all federal agencies through that date. However, we currently have cost information (uncertified) for EPA through September 30th, DOI Solicitor's Office through September 1st, U.S. Fish and Wildlife and the Bureau of Land Management through August 20th, the Forest Service through September 10th, and DOJ contractor costs through July 31st. The federal government's current cost demand through those dates is \$300,000. In addition to those costs, An ATSDR employee attended one of the Site visits this past summer and also has reviewed certain documents, and I am awaiting cost information from that agency. As Tom explained to you in Seattle, the United States is compromising DOJ attorney time costs through the past cost period (although Tom included DOJ travel and consultant costs in the cost amount that he sent to you just prior to the Seattle meeting, and the U.S. is seeking reimbursement of those costs).

Regarding future oversight costs, we intend to develop a protocol for post-Consent Decree oversight of implementation of the response action, O&M, and flood repair. We expect Union Pacific to fund oversight associated with construction and long-term O&M.

7. Scope of environmental release: We believe we agree with your general description of the release to be provided in a settlement between the parties, with the additional release

exclusion for any untested/unremediated areas within, through or emanating from the Plummer Junction. As we previously have stated, the covenants not to sue will be based on EPA's model RD/RA consent decree, and will include the model reservations of rights.

In order to be able to move forward expeditiously with these negotiations and with public release of the EE/CA in the near future, we would like to get your response to this letter as soon as possible. Please call one of us in the next couple of days to let us know when we might expect Union Pacific's response on these "agreement in principle" terms.

Sincerely,



Curt Fransen
For the State of Idaho



Howard Funke
For the Coeur d'Alene Tribe



Thomas W. Swegle
For the United States

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FROM: Tom SwegleDATE: 12/3/98NUMBER OF PAGES: 8 (INCLUDING COVER SHEET)

MESSAGE/INSTRUCTIONS: